

No. S.

OCT 11 1897
JAMES H. MCKENNEY,
CLERK

Bx. of Atty. Gen. (Reynolds & Richard)
for Appellees.

Filed Oct. 11, 1897.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE PUEBLOS OF ZIA, SANTA ANA, AND
Jemez, appellants,
v.
THE UNITED STATES ET AL. } No. 5.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

STATEMENT, ABSTRACT, AND BRIEF ON BEHALF OF THE GOVERNMENT.

OJO DEL ESPIRITU SANTO GRANT IN NEW MEXICO.

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STATEMENT, ABSTRACT, AND BRIEF ON BEHALF OF THE GOVERNMENT.

This suit was instituted jointly by the Indian *pueblos* of ZIA, SANTA ANA, and JEMEZ, for the confirmation of what is known as the OJO DEL ESPIRITU SANTO GRANT, better known as the Indian pasture grant, the same containing about 382,849 acres. The basis of the claim is that in the year 1766 representatives of these Indian *pueblos* petitioned the governor, Tomas Velez Cachupin, stating that from their foundation they have considered as their pasture ground a valley commonly called the Holy Ghost Spring (*Ojo del Espiritu Santo*), and in urgent cases the same was used for pasturage of the horses of the royal garrison, and the petitioners, being aware that the said valley had in its

vicinity some applicants to acquire the same by grant, it would cause them very great injury, as they have considerable cattle, sheep, goats, and horses for the royal service, and they did not have any other place to pasture them, particularly the people of the *pueblo* of Zia, the greater part of whose fields are upland and some of them adjoining the lands of their *pueblo*. Wherefore, they pray the governor to be pleased to declare said valley to be the *legitimate* pasture grounds and pasture of their *pueblos*, directing that the boundaries thereof be designated to them—that is, on the east the *pueblos*, on the west the summits of the Puerco river, on the north the place called Ventana, where some Navajo Apaches reside, and on the south the lands of the settlers of the Puerco river, etc. (R., 14-15.)

On the 16th of June, 1766, governor Cachupin directed Bartolomé Fernandez, chief *alcalde* of the *pueblos*, to examine the boundaries which they mentioned as of the Holy Ghost Spring, where they state they are pasturing their stock and horses, directing him to report the number of leagues the same may embrace from north to south and from east to west, and whether the three *pueblos* have the cattle, sheep, and horses proportional to the boundaries asked for; also whether any other citizen or citizens would be damaged by the boundaries under any prior grant or possession. (R., 15.)

Under this order, the *alcalde* made his report that he proceeded to examine the lands asked for by the *pueblos* of Zia, Santa Ana, and Jemez, and found that they contained from north to south, that is, from the stone ford,

which is the boundary of the citizen settlers of the Rio Puerco, to the Ventana, about eight leagues, somewhat more or less, and from east to west, that is, from the *pueblo* of Zia, which is nearest the lands asked for, to the Puerco River, about six leagues, somewhat more or less, in which distance he knows of no lands suitable for cultivation, the watering places being scanty and few, and they are only suitable for pasturing live stock, which is abundant at the said *pueblos*, and the said *pueblos* have no lands on which to sustain their stock, and it being true that the said boundaries will injure no one holding or to hold land within the same. (R., 15-16.)

Upon this report the governor, on the sixth day of August, 1766, at the town of Santa Fé, made his decree, stating that, in view of the petition of the *pueblos* and the report made by Bartolomé Fernández, they have held the lands for their live stock, which at present is abundant, without having any other places at which to pasture them except those referred to in the petition, together with the small watering places mentioned in said report, he declared that he would and did grant, in the name of his Majesty, the aforesaid lands for pasturing the stock and horses for the three *pueblos* of Santa Ana, Zia, and Jemez, with the boundaries from north to south from the place Ventana to the stone ford of the Puerco river, the same being the boundaries of the citizens of the place of San Fernando of Nuestra Señora de la Luz, and from east to west from the *pueblo* of Zia to the Puerco river, the eastern edge, the whole of the valley of the Holy Ghost Spring being embraced in the

center of the boundaries of this grant, with the condition and stipulation that in case of necessity the horses of the royal garrison shall be kept in the valley. The aforementioned boundaries to be for the future considered as the boundaries of the aforementioned *pueblos*, and they are to hold the same with legitimate title under this grant, and are not to be molested by any Spanish citizen or citizens taking their stock thereon, deeming the pasturage to be common. And he directs the *alcalde*, with the usual formalities, to place the parties in possession, and return the *expediente* in order that the proper *testimonio* may be furnished the grantees and the original deposited in the archives. (R., 16-17.)

Based upon this decree, Bartolomé Fernandez, on the 28th day of September, 1766, proceeded to place the three *pueblos* in possession of the land; the act of possession is in the usual form and the boundaries therein defined are the same as those ordered in the decree. (R., 17.)

Then follows the certificate of Velez Cachupin and the *testimonio*. (R., 17-18.)

The claim was presented to the surveyor-general under the law of July 22, 1854, and through the Secretary of the Interior reported to congress for confirmation, but no action was ever taken. The report is set forth in executive document No. 206, House of Representatives, Forty-third congress, first session.

It is claimed that the *pueblos* have since the date of the act of possession been continuously, openly, and notoriously in possession of the property, pasturing their

herds upon the same and cultivating certain portions thereof, under a claim of exclusive right thereto by virtue of the grant. That they are now in the open and notorious use and occupation of the same as the owners in fee, except that portion of it which may be in conflict with that certain grant known and called the Santissima Trinidad Galvana Ignacio Sanchez Vergara tract, in regard to which they admit they have released the same unto the claimants thereof. (R., 3.)

It is alleged in the petition that the heirs of Luis Cabeza de Baca claim a portion of the grant, and that they are informed that congress has confirmed a grant to the heirs of the said Baca for a tract of land called the Ojo del Espiritu Santo grant which was made May 23, 1815, to said Baca, and it laps upon and conflicts with the grant sued for, but no patent has ever been made or issued to the heirs of said Baca for the said tract of land so confirmed to them by congress, and it is alleged that Jacob Perea has obtruded upon that portion of the grant confirmed by congress to the said Baca, and that the defendants, Pedro Perea, Mariano S. Otero, and Charles H. Gildersleeve claim to have an interest in the same; that said proceedings before congress were without notice to them, and that the acts and confirmation by congress of said tract were irregular and void. Petitioners allege that prior to and during the year 1815 and continuously thereafter, they were in the actual and notorious possession of said grant, and that they had no notice of any application or proceedings or of any act of juridical possession of said Luis Cabeza de Baca under

the grant of said date, and that the aforesaid possession of the petitioners was well known to the said Baca, as at the date of said alleged grant and juridical possession to him they were in possession of the same as aforesaid; and for these reasons said grant to Baca was void as against the petitioners.

It is further alleged that if the action of the Spanish authorities in making the grant of 1815 and the action of congress confirming the same must be upheld by the court, that each and every acre of the grant sued for, covered by the confirmed grant of 1815 of Ojo del Espiritu Santo, is in excess of \$1.25 in value. (R., 4.)

It is further alleged, upon information and belief, that governor Chacon, on the 6th of March, 1798, made a grant of a tract of land to José Miguel Garcia and his associates, known as the Town of the Cañon de San Diego grant, which grant was confirmed by congress on June 21, 1860, upon the report of the surveyor-general, and it is contended by claimants that the boundaries of said grant as confirmed were largely in excess of those contained in the act of juridical possession and do not properly conflict with this grant, provided the court will restrict the act of confirmation and survey to two thousand one hundred *varas* lying between the south boundary of the Cañon de San Diego grant of 1788 and the north line of the *pueblo*. The petition closes with the usual prayer for relief. (R., 1-6.)

On behalf of the government, after traversing the formal allegations of the petition, its answer says it is untrue that the plaintiffs were placed in possession of the property claimed in 1766, and that they have ever since been

in the actual use and occupation of the same; that whatever right plaintiffs may have had to the land in question was purely a permissive right or license, subject to revocation by the authorities at any time, or subject to forfeiture by abandonment or nonuser, and whatever use and occupation they may have had of any part thereof was for pasture grounds and for no other purpose, and that the same had been abandoned as such long prior to the acquisition of the territory by the United States, and that at said time said license had been forfeited by non-user, and that the same has not for many years prior to the acquisition of this country by the United States been of any use or benefit to the plaintiffs. And that several years prior to Spain's relinquishing dominion over this province, to wit, in the year 1815, it granted a portion of said land to one Luis Cabeza de Baca, which said grant was recognized by the republic of Mexico, recognized by the government of the United States, and finally confirmed and patented by the United States to the heirs of said Baca. That the rights, if any, which plaintiffs may have had in and by said alleged grant of 1766 were ignored, denounced, and forfeited by said grant of 1815 to said Baca, and that the exercise of dominion and ownership over the same by the United States occurred at various times subsequent to said grant of 1766.

It is also alleged in the answer that the only authority of law the officials of said province had to grant lands to the Indians was in the form of a settlement or *pueblo*; that it was the policy of the Spanish government to consolidate and draw into communities all of its Indian subjects, and the authorities were limited to four leagues in

making said grants. That in obedience to said policy, law, and usage, particularly in this province, the officials granted to the Indians in no case more than four leagues, and in obedience to said custom, law, and usage each of the plaintiffs applied to this government for a confirmation of its *pueblo* and received a patent therefor, at said time making no claim for the land now sued for. With the usual formal allegations the answer closes, praying the rejection of the claim. (R., 6-8.)

Certain parties claiming under the grant of 1815 made to Luis Cabeza de Baca, made parties defendant to this action, filed their separate answer in which they deny that there is any such body or person known as the *pueblos* of Zia, Santa Ana, or Jemez, or that any such body, either jointly or separately, exists or has any right to exist in proceedings for the confirmation of any grant title whatever; denies that any such body was authorized or empowered or entitled to hold or take such real estate either under the laws of the kingdom of Spain, Mexico, or of the United States; denies that said Indians can bring suit by virtue of their designation as Indians of the *pueblo* of Zia, Santa Ana, or Jemez, or all of them combined. The remainder of this answer is a specific traverse of the allegations contained in the original petition. (R., 8-11.)

Testimony was taken before the surveyor-general in 1873 on the presentation of this claim to him under the law of 1854.

JUAN CASADOS testified on behalf of the claimants that he was sixty-seven years of age, was born and has since resided at the Cañon de Jemez, and knows the

tract of land called the Espiritu Santo grant. He understood it had been granted by the King for pastoral purposes to the *pueblos* of Zia, Santa Ana, and Jemez and neighboring white people of San Ysidro and other adjacent settlements. Has never seen the grant documents, and can not read or write. The natives of the *pueblos* have always had live-stock grazing on the tract, except during hostilities with the Navajos. He knows the boundaries of the land, as he has heard them from the old people in the vicinity, which are substantially as in the act of possession. Has never heard that the land or any part thereof was ever claimed or occupied by any other claimants except one Diego Baca, who resided at the spring for the last three years and has been cultivating land there and had some stock there also, but under what right he occupied it he did not know. Witness disclaims any interest in the property except the right to pasture his stock there. (R., 18-19.)

JUAN RUMALDO CASADOS testified on behalf of the claimants before the surveyor-general, that he was sixty-three years of age, born and lives in the Cañon de Jemez, and is a brother of the preceding witness. Knows the tract of land called the Espiritu Santo grant; it is bounded on the north by the high *mesa* of Ventana, on the south by the Vadito de la Piedra (rocky ford) on the Puerco river, on the west by the Puerco river, and on the east by the top of the Jemez mountains; that the reputed owners of the tract were the *pueblos* of Zia, Santa Ana, and Jemez, and the only party now in possession of the property was one Diego Baca, who had been residing there the last three years with his family,

but he does not know upon what right he occupies it. The Indians have always pastured their stock there, except when the Navajos prevented, and are now pasturing there. He does not know of any adverse claimant, and has no interest in the property. (R., 19-20.)

The claimants offered in evidence a petition filed with the surveyor-general, under the law of 1854, by the claimants of the Luis Cabeza de Baez grant, together with the testimony of Francisco Salas and Manuel Hurtado. (R., 24-28.) This offer does not include the title papers upon which the petition is based, and I shall take occasion to refer to the matter later on.

LORENZO LOBATO, on the trial, testified, on behalf of the claimants, that he is the governor of the *pueblo* of Zia, and he produced from his official custody the *testimonio* of the grant. It will be noticed that this witness and several Indian witnesses following have no idea of time or distance. Without attempting to abstract the testimony of these *pueblo* Indian witnesses, it may be admitted that the *testimonio* produced came from the proper custody, in proper form, and contains such a certificate as should be appended to all *testimonios* delivered to grantees as evidence of title. We have never been able to find the original *expediente* in the archives. It appears from the testimony of these witnesses that the three *pueblos* have been in the habit of pasturing their stock mostly within the *pueblo* lands, also on this grant, as well as in various other directions. It also appears that other people have been pasturing their stock on the grant; that from time to time the Indians, particularly those of Zia, when the

rains would furnish sufficient water, were in the habit of going out upon the grant and cultivating small portions of it and in the Cañada de las Milpas. (R., 30-71.)

On behalf of the government the following documentary evidence was offered, the whole of which has been omitted from the original transcript, and consequently omitted from the printed record; the offers will be found on pages 72-73 of the printed record, and are as follows:

1. All the papers in the case of Luis Cabeza de Baca for the confirmation of the Espiritu Santo grant. I have had copies of these papers certified to by the clerk of the court below and filed with the clerk of this court. The translation of the title papers, to which I shall hereafter call special attention, are as follows:

Luis Maria Cabeza de Baca or Ojo del Espiritu Santo grant. Reported No. 44. Offered in evidence by the United States. (R., 72.)

SIR GOVERNOR OF THE PROVINCE:

Dn. Luis Maria Baca, resident of Our Lady of Guadalupe of Peña Blanca, appears before you, with the due attention which law will allow me, and is convenient to me, and state, sir, that having registered a piece of uncultivated land, commonly called the Spring of the Holy Ghost, at this time distant five or six leagues from the *pueblo* of Jamez to the west, and being compelled to withdraw my animals to avoid difficulties with the Quintarsas Indians, and said tract contains sufficient capacity for my said animals, and considering that it is not injurious to any person, I humbly ask your Excellency to be pleased to grant me said tract in the name of his Majesty,

whom may God preserve. I ask for said tract for myself, for my children, fifteen in number, as upon said tract I intend to maintain my property and that of my children; a small tract can also be cultivated with some difficulty, as the water is scarce, although notwithstanding what I have stated I inform your Excellency that the Messrs. Ortiz state that said tract was granted to them by Don Fernando de la Concha, who was governor of this province. It is twenty and more years since that gentleman left this province, and during all of that time which I have stated it is not known that said Messrs. Ortiz have settled upon it with their families or their stock, nor leased or loaned it to any person, and if your Excellency is pleased to grant me said tract in the name of his Majesty, whom may God preserve, its boundaries are, on the east the summit of the Jemez mountain; on the west the Puerco river and the point of the Prieto table-land; on the north the table-land commonly called "La Ventana;" on the south the Cañon of La Querencia and the boundary of the farm of Don Antonio Armenta; in view of all which I humbly pray and request your Excellency to be pleased to accord my petition, in justice; by doing as I request I will receive grace, which I impetrated. I swear that it is not done in malice, &c.

Peña Blanca, May 23rd, 1815.

(Signed) LUIS MARIA CABEZA DE BACA,
Perseguido.

SANTA Fé, May 24th, 1815.

If, as represented by the petitioner, Don Antonio Ortiz has forfeited his right to the tract of the Spring of the Holy Ghost in the jurisdiction of the justice of Jemez in abandoning and depopulating it for more than twenty years, which should be forfeited according to the last royal order in reference to these cases, the petitioner may be

allowed to settle upon it, granting him in the name of his Majesty building lots, and inclosures with tracts of land for cultivation, and whatever more may appertain to said tract, for himself and his children, and I commission the justice of Jemez to superintend the arrangements for the settlement and preservation of order.

MAINEZ.

On the fourteenth of June, one thousand eight hundred and fifteen, by virtue of the foregoing decree of lieutenant-colonel Don Alberto Mainez, governor of this province, I proceeded, in company with my attending witnesses and the petitioners, to the land granted to Don Luis Maria Cabeza de Baca and his fifteen children, who are José Antonio Baca, Juan Antonio Baca, José Baca, Domingo Baca, José Miguel Baca, Luis María Baca, Ramon Baca, Prudencio Baca, Mateo Baca, Jesus María Baca, Juan Felipe Baca, Guadalupe Baca, Rosa Baca, Maria Josefa Baca, and Juana Paula Baca, at the aforementioned place of the Spring of the Holy Ghost, which, being examined by me, I made known to them the superior decree containing the favor granted to all those who were present. Being satisfied with what had been determined I put them in possession of said tract. They pulled up grass, threw stones toward the four points of the compass, and all exclaimed together in a loud voice, three times, "Long life to the King," as evidence of legal possession, which they took quietly without any opposition whatever. Pointing out to them the boundaries contained in the foregoing petition, as well as house-lots, enclosures, and tracts of land for cultivation in equal parts, without showing any preference, in accordance with the royal laws of the Recopilation of the Indies, which refer to resettlements, grants, donations, and in order that it may so appear, I signed, on said day,

month, and year, with my attending witnesses, in the absence of a notary, there being none of any description in this province, to all which I certify.

(Signed) YGNACIO SANCHEZ VERGARA.

Witness: (Signed) MIGL. MONTOYA.

Attending: (Signed) ANTO. ARMENTA.

The above is a copy of the original to which reference is made. In testimony whereof I affix my customary signature.

(Signed) YGNACIO SANCHEZ VERGARA.

SURVEYOR-GENERAL'S OFFICE,

TRANSLATOR'S DEPARTMENT,

Santa Fe, New Mexico, November 21, 1856.

The foregoing is a correct translation of the original on file in this office.

DAVID V. WHITING, *Translator.*

2. The papers in the case of the town of San Ysidro Grant. A similar certificate is on file with the clerk of this court. The papers are as follows:

Town of San Isidro grant. Reported No. 24. Offered in evidence by the United States. (R., 72.)

[Equivalent to seal second. (Seal.) One real. Seal third, one real, years one thousand seven hundred and eighty six and eighty-seven.]

To colonel DON JUAN BAUTISTA DE ANSA,
*Political and military governor
of this province of New Mexico;*

Antonio Armenta, the present senior justice and war-captain of the town of the Queres nation, and Salvador Antonio Sandoval, a re-enlisted soldier of this royal garrison, the two together, and each one for himself, appear

before your Excellency with the greatest submission and humility and in the most convenient manner to us, and state that both of us are without arable lands of our own to cultivate for the support of our families, nor pasture lands upon which to raise a few animals necessary for the same object. We therefore pray and request your Excellency to be much pleased to grant unto us, in the name of his Majesty, whom may God preserve, a vacant piece of land for cultivation and pasturage, situate at the termination of the league belonging to the town of Jemez on the southern side, to the boundary of the pueblo of [torn] on the northern side, on the east to the boundary of the land of the senior justice, Nerio Antonio Montoya, on the west the mountain of the Espiritu Santo Spring; that in doing as we request we will be entitled to your kindness and will receive grace and aid in our necessities, and we swear in due form that this petition is not made through malice, &c.

(Signed) ANTONIO DE ARMENTA
And SALVADOR ANTONIO SANDOVAL.

DECREE.

In the city of Santa Fé, on the fourth day of the month of May, in the year one thousand seven hundred and eighty-six, before me, Juan Bautista Anza, colonel of cavalry of the royal armies of his Majesty, political and military governor of the province of New Mexico, came the foregoing petition, the contents whereof having been ascertained and admitted, and in attention to their request, and no injury resulting to any third party, I did and do grant, in the name of his Majesty, whom may God preserve, to the aforesaid Don Antonio de Armenta, the present senior justice of the jurisdiction of the Queres, and to the militia sergeant of the same jurisdiction, the grant of land the asked for, on condition

that they cultivate the same in conformity with the provisions of the royal decree, and which may not be included in the town of Zia and Jemez, or any other person thereto adjoining, and for the purpose of giving them the royal and personal possession in the terms before mentioned, I commission and grant such authority as is required by law to Don Nerio Antonio Montoya, senior justice of the jurisdiction of San Carlos de la Alameda, who, by virtue of this commission and previous citation and attendance of the adjoining residence, and no injury resulting to any third party, that he will place them in possession, measuring the number of *varas* it may contain in each direction, which will be noted in the proper deed of possession, as the place designated for the establishment of the proper monuments, which, in the absence of cement and mortar, are to be constructed of stone bound together with cedar timber sufficiently well set in the ground, and which shall be erected within the period of two months after possession, and if not complied with in that time they shall forfeit their right to the grant made, and upon the completion of all the originals will be returned to me to be transferred to the government books under my charge. I have so provided, ordered, and signed with my attending witnesses, in the absence of a royal or public notary, there being none of any description in this government, to which I certify.

ADDITION.

This grant is made with the further condition that the aforementioned *pueblos* of Zia and Jemez shall not be disturbed in their pre-emption and the use of the water.

(Signed) JUAN BAUTISTA DE ANZA.

Attending:

FRANCISCO PEREZ, *Secretary.*

CRISTOVAL MARIA DE LARRANAGA.

POSSESSION.

At this point of San Isidro de los Dolores, on the sixteenth day of the month of May, in the year one thousand seven hundred and eighty-six, I, Don Antonio Nerio Montoya, senior justice and war captain of the jurisdiction of San Carlos de la Alameda, by virtue of the commission conferred upon me by Don Juan Bautista de Ansa, colonel of cavalry of the royal armies of his Majesty, political and military governor of this province of New Mexico, being at the aforementioned place, having summoned the natives of the *pueblos* of San Diego, Jemez, and Zia, who are adjacent residents, and having measured the league belonging to them with two hundred and sixty-two *varas* more, with which they expressed themselves satisfied, some of the Indians having planted some small patches, and not to offend them, I allowed them to retain possession of them; with your Excellency's permission, I also proceeded to the *pueblo* of Zia and measured the league belonging to that *pueblo*, with the further amount of one thousand six hundred and thirty-two *varas*, which the Indians purchased from Juan Galvan, as shown by the title deeds of said purchase, and to the aforementioned lands I assigned thereto and added one thousand *varas* more, the Indians having asked me for it, and the said Indians having shown to me a sale made by the late Miguel Montoya, which boundaries are in a *cañon* commonly called Elrito Salado, that this *cañon* is the pasture ground and summer range for their cattle, the boundaries of which land are the same called for in the title deeds, on the north a red hill, on the south a white table-land, and on the east the Jemez river itself; and having informed myself of the contents of the two deeds, and having found in them only what has been above stated, I gave the two *pueblos* to understand what belonged to each of them, that of Zia what they had acquired by purchase, and that of Jemez what had been

granted to them by his Majesty, and believing that neither of the *pueblos* were entitled to the piece of ground which is unoccupied, and it being the intention of our sovereign that his lands shall be settled upon by his subjects wherever there may be any surplus, and finding no impediment, and by virtue of the commission which I hold from his Excellency, I proceeded to the land lying between the two *pueblos*, which, upon being measured, was found to contain two thousand nine hundred *varas*, and no person appearing who claimed a better right, both *pueblos* being present, as well as the senior justice, Antonio Armenta, and the militia sergeant, Salvador Antonio Sandoval, and being informed of all the circumstances, I took them by the hand, walked with them over the land; they pulled up grass, threw stones toward the four winds of heaven, and we all exclaimed three times, "Long life to the King, our sovereign (whom may God preserve)," in proof of legal possession, which I gave them, and they received quietly and peacefully, without any opposition, the boundaries whereof are as follows: On the north the lands of Jemez; on the south the lands of the *pueblo* of Zia; on the west the mountain of the Espiritu Sancto Spring, at the place commonly called "Los Baños;" on the east the lands of the aforementioned senior justice, Antonio Nerio Montoya, which is the road leading from Cochiti to Jemez, and having assigned their boundaries, and no injury resulting thereby, and being satisfied with them, I directed them to erect permanent boundaries; and in order that it may so appear, I, Nerio Antonio Montoya, as commissioner and senior justice, at the same time signed, with two attending witnesses, with whom I act in the absence of a royal or public notary, there being none in this kingdom, to which I certify.

(Signed) NERIO ANTONIO MONTOYA.

Witness: TORIBIO GONZALES.

Witness: SALVADOR LOPEZ.

This copy agrees with the original, to which reference is made, from whence I, Nerio Antonio Montoya, senior justice and war captain, took this copy at the verbal request of the party, which is true and correct, my two attending witnesses being present when it was made. It is contained on three written pages, and is taken at this *pueblo* of Zia on the sixteenth day of the month of May, in the year one thousand seven hundred and eighty-six, signed with my hand in the absence of a public or royal notary, there being none in this kingdom.

It is (torn) stamped paper in this said kingdom of New Mexico, to which I certify.

To this copy I attach my customary signature.

(Signed) NERIO ANTONIO MONTOYA.

Witness:

(Signed) TORIBIO GONZALES.

Witness:

(Signed) SALVADOR LOPEZ.

SURVEYOR-GENERAL'S OFFICE,
TRANSLATOR'S DEPARTMENT,
Santa Fé, New Mexico, June 7th, 1859.

The above is a translation of the original on file in this office.

DAVID V. WHITING, *Translator.*

3. The papers in the surveyor-general's office in the grant to the Town of Cañon de San Diego. A similar certificate is on file, and the papers are as follows:

*Town of Cañon de Santiago grant. Reported No. 25.
Offered in evidence by the United States. (R., 72.)*

[Corrected. Two reales. Copy. (Seal.) Seal third, two reales for the year one thousand seven hundred and ninety-eight and ninety-nine.]

To the Lieutenant-colonel and governor of this province:

Francisco and Antonio García, brothers and interpreters of the Navajo nation, in unison with Miguel García, Joa-

quin Montoya, Salvador Garcia, José Manuel Garcia, Juan José Gutierrez, Juan de Aguilas, Blas Nepomuceno, Garcia Bartolome Montoya, José Montoya, Tomas Montoya, Juan Domingo Martin, José Gonzales, Salvador Lopez, Antonio Abad Garcia, Miguel Gallego, Marcus Apodaca, José Miguel Duran, and José Maria Jaramillo, appear before your Excellency in the most approved manner the law requires and may be necessary and state that a quantity of vacant and uncultivated land lies in the Cañon of San Diego, adjoining the boundaries of the lands belonging to the Indians of the town of Jemez; and whereas the settlement thereof would be beneficial to the province and advantageous to our present families and descendants to be settling upon these lands with our property and cultivating the same, we pray your Excellency to be pleased to grant this aid and settlement that we petition for to the persons herein mentioned, being pleased at the same time to order in the name of his Majesty (whom may God preserve) that we may receive from the boundary beyond the lands granted to the Indians of the *pueblo*, our petition calling for from east to west to the middle *arroyo*, called Los Torreones, and the line running from north to south to the Vallecito de la Cueva, which is in front of the water-fall and in a transverse line from said middle *arroyo* to the Rito de la Jara. We also protest that we will not injure with our persons or stock a few trees which the Indians claim as their own, although they are planted beyond the limits of the lands which belong to them. Therefore we humbly pray your Excellency to be pleased to order our request to be complied with, granting us the vacant land asked for, by doing which we will receive grace, and we swear in due form that our petition is not made through malice; and one signed, the others not knowing how.

(Signed)

JOSÉ MIGUEL GARCIA.

DECREE.

Santa Fé, March 6th, in the year one thousand seven hundred and ninety-eight. In view of the foregoing petition made by José Miguel García and the other citizens therein mentioned, in regard to settling in the *cañon* known as San Diego de Jemez, where the interpreters of the *Narajo nation* were temporarily stationed, I grant to them the aforesaid land in the name of the King, our sovereign, with the express condition that it is to be settled by at least twenty citizens; that the lands are to be distributed in equal parts, and that they are not allowed or authorized for themselves or their heirs to sell or dispose of the lands granted to them, it being his Majesty's will according to his last orders that the lands should descend from father to son or his heirs in a direct line, and if any colonists to suit his own convenience should desire to remove under any pretext whatsoever, his possession or share shall remain for the benefit of the one taking his place, in which case the residents of the same place or persons marrying there shall be preferred, and for which no remuneration whatever shall be exacted by the person voluntarily absenting himself or expelled or banished by the authorities on account of his bad conduct. That besides this subdivision above mentioned a sufficient amount of land is to be left for pastures and watering places as well as to allow for the increase of the settlement if such may be the case (which is likely to occur) — (torn) — order the chief justice of that jurisdiction, Don Antonio Armenta, to place the parties in possession under the rules prescribed by law.

(Signed)

CHACON.

POSSESSION.

In the Cañon of San Diego de los Jemez, on the fourteenth day of the month of March, in the year one

thousand seven hundred and ninety-eight, I, Don Antonio de Armenta, chief justice of the *pueblo* of Jemez, by virtue of the authority conferred upon me by my superior chief, Don Fernando Chacon, Gentleman of the Order of Santiago, lieutenant-colonel of the royal armies, political and military governor of this province of New Mexico, being at the aforementioned place, and having summoned the natives of said *pueblo* of Jemez, to whom having measured one league belonging to them, I found a surplus of two thousand one hundred *varas* which they had, before arriving at the Cañon de San Diego, all of which they claimed as their own without having any right to them in any manner, and believing that they had no right to it, and knowing that it is the wish of our sovereign that his lands be settled upon by his subjects in whatever a surplus may be found, and finding no impediment whatever, and using the authority in me vested, I proceeded to the surplus lands, and finding no one with a better title, and Francisco Garcia, Antonio Garcia, Navajo interpreters, Miguel Garcia, Joaquin Montoya, Salvador Garcia, José Manuel Garcia, Juan José Gutierrez, Juan de Aguilar, Juan Blas, Pomueeno Garcia, Bartolomé Montes, Tomas Montoya, José Montoya, Juan Domingo Sangil, Salvador Lopez, José Gonzales, Antonio Abad Garcia, Miguel Gallego, Marcus Apodaca, José Miguel Duran, and José Jaramillo being present, all interested and well informed in regard to the matter, I took them by the hand, walked with them over said lands, they pulled up grass, threw stones toward the four winds, and we all cried at once three times, "Live the King, our sovereign (whom may God preserve)," in proof of legal possession, which they received quietly and peaceably, without any opposition whatsoever, because after concluding with all these ceremonies I delivered to each one of said settlers three hundred *varas* with which they were well satisfied, leaving the remainder for

the benefit of all, and without any other land being left for any other person to enter, and in order to prevent any other from coming in to meddle and create difficulties between the citizens as well as the Indians, I gave them to understand which were their boundaries, which are: On the north the Vallecito de la Cueva; on the south the termination of the Indian league; on the east the boundary of Vallecito; and on the west the opening towards the middle *arroyo* and the Rito de la Jara. And no injury resulting to any one, they were all satisfied, and in order that it may so appear, I, the said chief justice, signed with my two attending witnesses, in the absence of a public or royal notary, there being none within the limits of all this government, to which I certify.

(Signed) ANTONIO DE ARMENTA.

Witness: (Signed) SALVADOR LOPEZ.

Witness: (Signed) JOSE MIGUEL GARCIA.

This copy agrees with its original, to which reference is made and from whence I, the said Don Antonio de Armenta, chief justice, took this copy at the verbal request of the parties. It is correct and genuine and my attending witnesses were present when it was made and compared and the original remains in the archives in charge of the governor, Don Fernando Chacon, and it is made at this *pueblo* of Jemez, on the sixteenth day of the month of March in the year one thousand seven hundred and ninety-eight. Signed with my hand in the absence of a public or royal notary, there being none in this government; to which I certify.

In testimony of the truth I hereto attach my customary signature.

(Signed) ANTONIO ARMENTA.

Witness: (Signed) SALVADOR LOPEZ.

Witness: (Signed) JOSE MIGUEL GARCIA.

SURVEYOR GENERAL'S OFFICE,
TRANSLATOR'S DEPARTMENT,
Santa Fé, New Mexico, June 3, 1859.

The foregoing is a correct translation of the original on file in this office.

DAVID WHITING, *Translator.*

These grants have all been confirmed and patented, and the preliminary survey, upon which the claim is based for the grant in question, shows substantial conflicts, and they were offered in evidence for the following reasons:

To show the exercise of the right of disposition on the part of the Spanish government of lands lying within the outboundaries of this pasture grant.

To show that the land included within this alleged grant was vacant and unclaimed.

4. The next offer (R., 72-73) was the official map from the surveyor-general's office, Zia, Santa Ana, and Jemez Map, marked "TT."

Mr. WILL. M. TIPPOX, the expert for the government, testified as to the conflicts with the grant in question, and his testimony, being short, should be read when the plat is examined. (R., 73.)

5. The next offer was the papers in the cases of the *pueblos* of Zia, Santa Ana, and Jemez, for confirmation of their league grants, which I have had copied, and the proper certificate filed with the clerk of this court. (R., 76.)

DIEGO BACA testified on behalf of the defendants that he was sixty-nine years of age, and has resided at the Ojo del Espiritu Santo since 1869, and has known the spring

since 1842; he was at the spring then with his father, who had been sent to that country as commissioner to treat with the Navajos, and there was nobody occupying it at that time. There were neither horses nor cattle being pastured there, because the Navajos would not allow it. About a year afterwards the Jemez Indians were pasturing their stock at the Mesa de Vallecito. In 1852 the witness had occasion to pass through the lands and they were not then occupied by the Indians. Since he has been there everybody has pastured stock from the *pueblos* to the Rio Puerco. The land was not occupied in 1842 by anyone. Witness when very young knew Luis Maria Cabeza de Baca, who was his grandfather. The remainder of his testimony is in relation to the genealogy of the Baca family. (R., 77-81.)

FRANCISCO ARCHIBEQUE testified on behalf of the defendants that he was sixty-five years old and lives at Algodones, and knows where the *pueblos* of Zia, Santa Ana, and Jemez are. Knows the Vado de Piedra, on the Rio Puerco, and knows the stretch of country from that point on the south to the Ventana on the north, and between the *pueblos* of Jemez and Zia and the Rio Puerco; also the Ojo del Espiritu Santo. Has known them since he was about twelve years old, and has herded sheep all over the country east of the Rio Puerco ever since he was ten years old until last October, except when the Indians were hostile. When he first went to the tract some Mexicans were herding sheep and cattle on it, but he can not say that anybody was there permanently. The Indians from Zia sometimes would reach up as far as the Cañada

de las Milpas. They would occasionally have some farms and then go back to Rincones Zia, just north of the *pueblo*. Had seen some loose animals of the Jemez Indians up as far as the Peñasco, but never saw any ranch there. There were ranches for sheep breeding belonging to Jesus Trujillo, but the Indians had no ranch there. The Jemez Indians kept cattle north of their *pueblo* to the mountains, and he has seen their horses there many times. The Indians of Santa Ana pastured their horses and cattle on the *mesa* north of the *pueblo*, which *pueblo* lies the farthest east of the three. He never saw the Santa Ana Indians pasturing their horses as far west as the Puerco, and never knew that anyone was prohibited or disturbed from pasturing animals on the land lying from the Zia *pueblo* to the Puerco river and from the Ventana to the Vado de Piedra. Witness was never permitted on the land except from the Cañada de las Milpas to the river on this side; he never heard of permission being granted to anyone, but all people pastured the land with their sheep, horses, cattle, and burros. Witness designated a number of places at which ranches had been established and houses erected. The Cañada de las Milpas is about five miles from the *pueblo* of Zia to the west, and has seen cultivation there—watermelons, some muskmelons, pumpkins, and some strips of corn planted by the Indians of Zia. On cross-examination witness testified that the Indians prohibited him from going on the lands between the Cañada de las Milpas and the *pueblo* of Zia. (R., 81-85.)

SEMON ARCHIBEQUE testified on behalf of the defendants that he was fifty-nine years of age, resides at Algo-

dones, and is acquainted with the tract of land between the *pueblos* of Zia and Jemez and the Puerco river, and knows the place called Ventana and the Vado de Piedra. Has known the land lying between these points since 1853, when he was up there herding sheep, and at that time the land was unoccupied. The Cañada de las Milpas empties into the Rio Salada at the south. Sometimes strips of the Cañada de las Milpas were occupied by farms for cultivation and sowed with corn and watermelons. Has known the place called the Peñasco since 1853, at which time no one was occupying it. Afterwards he saw some sheep-lambing ranches there belonging to various persons. There were no improvements. During the years that he was pasturing there the Indians of Zia, Santa Ana, and Jemez pastured their cattle from the Mesita de la Vallecita to the Chihuahua. Knows the Cañada de Achavarria. (R., 85-88.)

ESQUIPULA NIETO testified on behalf of the defendants that he lives at Rio Puerco, and was born in 1822, and has resided at the Puerco since 1874, living at Bernalito prior to that time. Knows the tract of land extending from the *pueblos* of Zia and Jemez to the Puerco river and from the Ventana on the north to the Vado de Piedra on the south. Witness's limited knowledge of the country seems to have been acquired since 1874. (R., 88-89.)

JESUS TRUJILLO testified on behalf of the defendants that he was seventy-eight years of age, and has resided at the Cañon de San Diego for that length of time. Is acquainted with the country from the *pueblos* of Jemez

and Zia to the Puerco river; knows the place called Ventana, also the Vado de Piedra, and has known all that country since he was born, and since he has been grown has been over the country frequently, and since he was twenty-five years old has been quite familiar with it. Has been frequently into the *pueblos* when he was a boy; they had live stock then and pastured them toward the *mesa* and surroundings, and they did not pasture away from that point on account of the wars with the Navajo Indians. In 1840 saw very few pasturing sheep and horses between the *pueblos* and the Puerco river, but those that pastured there were Mexicans. He was the first one to occupy the Espiritu Santo in 1846-47, and for eight or ten miles on either side there was nobody occupying it, though there were a few sheep herded around there. The Indians were in the habit of pasturing their animals to the hills and mountains and to the Jemez river, which runs to the south. He lived at the Ojo del Espiritu Santo for four years and during that time the Indians did not pasture their animals near this spring. He left the spring because notice was served on him that the land and spring belonged to Tomas Baca. (R., 89-92).

POLITO MONTOYA testified on behalf of the defendants that he lives at Albuquerque and is forty-six years old. Knows the tract of land lying between the *pueblos* of Jemez and Zia and the Rio Puerco. He formerly lived at the Jemez Hot Springs. The land lying between the Rio Puerco and the *pueblos* is about twenty-five miles from the Hot Springs. Witness lived on the land lying between the *pueblos* and the Rio Puerco, first at the Ventana

and then at the Cañoncito, living there from 1876 to 1880. Lived at Jemez Hot Springs from 1880 to 1890. While living at the Ventana he occasionally traveled down as far the Ojo del Espiritu Santo. There were some settlements at Ventana, consisting of twenty or twenty-five families. Between the Ventana and the Ojo del Espiritu Santo there was nothing. Don Diego (Baca) was there with his family, and the rest of the land was occupied with stock belonging to Mexicans. Did not know where the Indians were pasturing their stock. (R., 92-95.)

WILL M. TIRROX, the government's expert, testified on behalf of the defendants: Identified the plat marked "Pueblo Claim 'TT'" in the office of the surveyor-general, and says that it bears no mark that it came into the office of the surveyor-general in 1855, when the archives were turned over to him; the document is not an original archive, but was filed with the papers in the case. (R., 95.)

This was all the testimony in the case.

BRIEF AND ARGUMENT.

The Court of Private Land Claims rejected this grant in an opinion written by Mr. Justice Stone, which the clerk failed to attach to the transcript sent forward, but which is attached to this brief as Appendix I, wherein it is held that the grant to the Indians of the *pueblos* of Zia, Santa Ana, and Jemez was for pastoral purposes only, and did not, by its terms or intent, convey anything more than a license or permission for that purpose; that such use was subject to be terminated by any act on the

part of the government inconsistent therewith, and by virtue of its exercising the right of disposition over certain portions of the same, and by virtue of the transfer to the United States, the permission to use the same for these purposes was revoked.

On behalf of the appellants it is contended that the grant was intended to and did convey to the *pueblos* named an absolute and unconditional title to the land, and, although it was specified to be for pastoral purposes, the use which was to be made of it did not affect the character of the estate conveyed thereby.

Counsel for appellants insists that the governor of the territory of New Mexico, under the Laws of the Indies, in force at the time this grant was made in 1766, had full power to pass the title to these lands, irrespective of the use which was to be made of them. Without discussing at this point the powers of the ancient governors, I desire to call to the attention of the court the title papers themselves, with a view of determining therefrom, if possible, the intent of the parties. Appellants, in making up the transcript, have failed to include therein a copy of the original text in Spanish of the *testimonio*. I have had the same copied and carefully compared and attached to this brief as Appendix II.

Commencing with an examination of the translation of the title papers (R., 14), we find that Felipe Tafoya, a lawyer of the town of Santa Fé, representing the three *pueblos* of Zia, Santa Ana, and Jemez, in the name of Cristoval, the Indian governor of the *pueblo* of Zia, and Thomas, chief war captain of the said *pueblo*, by virtue

of an appointment from the inhabitants of their republic, states that from their foundation "they considered as their pasture ground in the vicinity of their *pueblos* a valley commonly called the Holy Ghost Spring," and that in urgent cases the royal garrison had used the same for the pasturing of horses, and they being aware of parties desiring to acquire the same by grant, which would cause them great injury, as they had a great many cattle, sheep, and horses, and had no other place to pasture them, particularly the *pueblo* of Zia, wherefore they prayed that the governor, in the name of his Majesty, "be pleased to declare said valley to be the legitimate pasture grounds and pasture of the said *pueblos*," and requesting that the boundaries be designated as named in the petition.

Upon this petition governor Cachupin, on June 16, 1766, referred the matter to Bartolomé Fernandez, chief *alcalde* of said *pueblos*, to examine the boundaries mentioned as of the Holy Ghost Spring and to report the leagues the same would embrace from north to south and from east to west, and whether the *pueblos* had the cattle, sheep, and horses proportional to the boundaries asked for their grazing, and also whether any citizens were damaged by the boundaries asked under any prior valid grant and possession. (R., 15.)

The *alcalde* reported that no prejudice would result from granting the same, and also the distances requested. (R., 15-16.)

Following this, on August 6, 1766, governor Cachupin made the grant, wherein he states, after the formal parts,

"I would grant and I did grant, in the name of his Majesty (God preserve him), the aforesaid lands for pasturing the stock and horses of the aforesaid three *pueblos* of Zia, Santa Ana, and Jemez," designating the boundaries, upon the condition that in cases of necessity the royal garrison might be permitted to pasture their horses within the same; stating further that "they will hold the same with legitimate title under this royal grant, so that they be not molested by any Spanish citizen or citizens, taking their stock thereupon, deeming the pasturage to be common," concluding the grant in the usual form. (R., 16-17.)

In defining how the property should be held, it is contended by the government that appellants' translator has given a legal construction, rather than a literal translation, to the language contained in the original. The Spanish text in the granting clause is, "*para que lo posean con derecho lejítimo*," which should be translated, "they will hold the same with legitimate right of possession."

If governor Cachupin had intended to transfer the absolute title and dominion to the same, he would have adopted appropriate words for that purpose, such as "*para adquirir lejítimo derecho de propiedad y señorío*," which words, "*propiedad y señorío*," are somewhat equivalent to the English words, "fee simple."

Again, it will be noticed that the granting decree does not provide for the right of succession on the part of any one, nor does it provide, as is usual, that the property shall be occupied continuously for the space of at least

four years, before the party would be entitled to solicit a complete title thereto. In all grants, whether the land was to be used for pastoral or other purposes, when it was intended that the highest grade of title should ultimately be passed, apt words were used in the granting decree to express that intent, which appear to be absent from governor Cachupin's decree, and it must be admitted that he was a man fully competent by education and ability to adopt words clearly expressing his intent. Construing the language of the petition, in connection with the language of the granting decree, I am led to the conclusion that the absolute title and dominion, with the right of disposition in the grantees and the right of succession in any one, was not anticipated or intended to be conveyed in this grant.

The act of possession is in the usual form and throws no light upon the estate sought to be conveyed.

At the trial in the court below of the case of Roman A. Baea *v.* United States for the confirmation of the Felipe Tafoya grant, which is now pending on appeal in this court, No. 108 on the present docket, the Court of Private Land Claims had occasion to reexamine its opinion rendered in this case, and therein confirmed its construction of the title papers presented here; after a careful comparison of the recitals contained in the decree of governor Cachupin with those in the decree of governor Mendinueta in the Baea case, which was a grant for pastoral purposes to Felipe Tafoya and others. A copy of this opinion is attached to this brief as Appendix III.

In the Baeca case it appears that Felipe Tafoya (also the attorney for the Indians in their petition in the present case), representing himself and two others, in December, 1766, applied by petition to the governor of the province of New Mexico for a grant of land for the purpose of pasturing their stock, and on December 3 governor Cachupin, the same governor who made the grant to the Indians, made a grant in accordance with the prayer of the petition, translation of which is fully set forth in the opinion of the court (Appendix III). Subsequently, in 1767, Felipe Tafoya, as attorney for himself and the Chaveses, presented another petition to governor Mendieta, asking for the land on behalf of himself and the said Chaveses. In his petition he referred to the grant made by governor Cachupin in 1766 to them for pastoral purposes, and asked that they be given title to the land, it being fit only for grazing and pasturage. June 15, 1767, governor Mendieta directed *alcalde* Bartolomé Fernandez to report upon the same.

June 16, 1767, the *alcalde* made his report, upon which the governor made the grant of one league by courses, stating "which commission and grant I did make to them, their children and successors, under the condition that they shall settle the land with their stock for the four years required by law, to enable them to acquire the legal title and dominion," etc. This grant was only for pastoral purposes, and the government contended that it came within the principle announced in construing the title papers in the case at bar. Mr. Justice Murray, for the court, proceeded to distinguish the two, upon the wording of that

portion of the granting clause of the two documents wherein the language is different.

In the Tafoya grant the Spanish wording is "*para adquirir lejítimo derecho de propiedad y señorío,*" which he translates as "in order to acquire legitimate right of property and dominion;" whereas in this case the granting clause is "*para que lo posean con derecho lejítimo;*" and based upon the fact of the difference in wording in the granting clause of the two grants, and also that the right of succession was provided for in the Tafoya grant, and the conditions under which legal title might be solicited were set forth, the court determined that it was the intention to pass to Felipe Tafoya and the Chaveses such an estate as would enable them, by complying with the conditions of possession, to perfect their title, and in respect of the grant to the Indians, it failing to recite that the property and dominion was to be transferred, failing to provide the right of succession, and failing to provide that the conditions of occupation must be fulfilled that perfect title might be acquired, the court was induced to hold that it was not the intention of governor Cachupin nor the Indians that anything more should pass than a license or permission to use the land for pastureage, which was subject to revocation by the sovereign government and forfeiture by the Indians in case of non-user and abandonment. And in view of this it is contended that the various citations by counsel for appellants of the Laws of the Indies in relation to the rights of Indians and citizens have no application.

It appears in evidence that as early as 1788, Francisco and Antonio Garcia petitioned for the Cañon de San Diego, and the right to cultivate and occupy the *cañon* was granted them; that in 1798 the said Garcias in conjunction with eighteen others petitioned for a large grant, including the former grant to them, which large grant is partly within the boundaries of the pasture grant to the Indians and has been confirmed by congress. These two latter grants are the subject of contention in the case of Amado Chaves *v.* United States, No. 4, on the present docket, which immediately precedes this case. It also appears that in 1786, governor Anza made a grant to Antonio Armenta and Salvador Antonio Sandoval, for what is called the town of San Ysidro grant, which has been confirmed and patented by congress and lies almost wholly within the boundaries of this grant. Also that in the year 1815, Luis Maria Cabeza de Baca petitioned for the land covering the Holy Ghost Spring, which is the central point mentioned in the pasture grant to the Indians; this grant has also been confirmed and patented by congress and lies wholly within the boundaries of the grant claimed by them. The title papers of all of these grants appear in the statement of this case.

It is apparent from the recitals in the title papers and the findings of the officials making these grants that the title of the Indians was not recognized, and by virtue of the making of these grants the license that had been given them was necessarily revoked, and the proceedings therein are inconsistent with the idea that these officials

from 1788 to 1815 recognized any greater title in the *pueblos* than a mere license or permission to use the land for the purpose stated in the grant to them.

Therefore a consideration of the language of the title papers themselves and the exercise of the right of disposition by the various governors of the province from 1786 to 1815 over a large portion of the land lying within the boundaries of the grant claimed by the Indians justifies the conclusion that whatever rights they acquired by their grant were usufructuary and nothing more, subject to revocation by the sovereign, and such right of revocation was exercised in making these later grants.

I respectfully submit that the judgment of the Court of Private Land Claims was correct.

Respectfully submitted,

MATTHEW G. REYNOLDS,
Special Assistant to the Attorney-General.

JOHN K. RICHARDS,
Solicitor-General.

APPENDIX I.

*Opinion of Court of Private Land Claims, Stone, A. J.,
rejecting the grant.*

On behalf of the court I am authorized to announce its conclusion upon hearing and submission of this case.

Petitioners, the three Indian *pueblos* of Zia, Santa Ana, and Jemez, seek confirmation of title to a certain area of land, outside their *pueblos*, alleging a grant therefor by the governor-general of the province of New Mexico, in the name of the King of Spain, in the year seventeen hundred and sixty-six, as a perfect grant of the lands for pastoral purposes, and averring occupation and use thereof for such purpose to the present time.

Many grounds of defense are set up by the United States, and others are interposed by certain parties defendant claiming adversely under titles to tracts embraced in whole or in part within the boundaries of the claim in issue.

The principal questions we have deemed necessary to consider are :

First. What is the character of the title shown; perfect or imperfect? And

Second. Is it a grant of title to the land itself, or only a usufruct, the right of pasturage thereon?

Numerous objections were taken upon hearing to the muniments of title offered by petitioners, as well as to the character of the possession and uses of the lands, but we do not pronounce these objections sufficient to defeat the validity of the title to the estate granted, whatever

its character may be. Hence it may be said that if the title could be determined to be a grant of the land itself the proofs might not be wanting to place it in the class of what we term perfect grants. Be that as it may, however, it is not believed to be necessary to pass upon these objections to the evidence absolutely, since, in view of our conclusion touching the nature of the estate or right granted, the regularity of the proceedings may be conceded.

The character of the grant—that is, the nature of the estate granted—is to be tested chiefly, if not wholly, by the language employed in the prayer of the petitioner embracing the object or thing prayed for and by the terms of the granting clause in the grant document. Therein we are to look for the purpose and intent of both the grantee and grantor.

The petitioners to the governor, after reciting that they "from their foundation have considered as their pasture ground in the vicinity of said *pueblos* a valley commonly called the Holy Ghost Spring, and that in some urgent cases the same, as is known, is used as a pasture ground for the horses of the royal garrison, and the said parties being aware that the said valley has had in its vicinity some applicants to acquire the same by grant, which will cause them very great injury, as they have considerable cattle, sheep, goats, and horses for the royal service, and not having any other place in which to pasture them," conclude as follows:

"In consideration of all of which I ask and pray that your excellency, in the name of his Majesty (whom may God preserve), be pleased to declare said valley to be the legitimate pasture grounds and pastures of the *pueblos*, directing that the boundaries thereof be designated to them," etc.

Upon receipt of the petition the governor formally ordered the chief *alcalde* of the *pueblos* to examine the

boundaries "where they state they pasture their stock and horses," and report the area embraced, "and whether the aforesaid three *pueblos* have the cattle, sheep, goats, and horses proportional to the boundaries asked for for their grazing."

The report of the *alcalde* sets forth the boundaries and that they did not contain, to his knowledge, any lands suitable for cultivation, being "only suitable for pasturing and live stock, which is abundant in said *pueblos*."

Upon this report the governor issued the granting document, the granting clauses therein being as follows:

"In the town of Santa Fé, on the sixth day of the month of August, one thousand seven hundred and sixty-six, I, Tomas Velez Cachupin, governor-general of this kingdom of New Mexico, in view of what is petitioned for by the three *pueblos* of Santa Ana, Zia, and Jemez, of the Queres nation, and of the report which their chief *alcalde*, Bartolomé Fernandez, makes, that they have held said lands for their live stock, which at present is abundant, without having any other places in which to pasture them except those referred to in their petition, together with the small watering places mentioned in said report, declared that I would grant, and I did grant, in the name of his Majesty (God preserve him), the aforesaid lands for pasturing the stock and horses of the aforesaid three *pueblos* of Zia, Santa Ana, and Jemez, with the boundaries, etc., "with the condition and stipulation that in case of necessity the horses of this royal garrison of Santa Fé may and shall be kept in said valley, the same being a place where they have been accustomed to graze; wherefore the aforementioned three *pueblos* are to place no obstacle in the way nor claim damage therefor; and the aforementioned boundaries being for the future considered those of the aforementioned three *pueblos*, they will hold the same with legitimate title under this royal grant so that they be not molested by

any Spanish citizen or citizens taking their stock there-upon, deeming the pasturage to be common." Possession was thereupon given with the usual formalities of juridical possession, "under the conditions mentioned in the aforesaid grant."

It will be seen by the foregoing that the avowed and expressed purpose sought and asked by the petitioners was the right to pasture their live stock on the land in controversy, and free from molestation by other parties seeking grant of the lands or like privilege of pasture, except the government itself, which reserved the right of common pasturage for its cavalry horses.

The governor was not asked to grant the land by the usual formula of words therefor, but the language he used is in the following precise form, viz: "In consideration of all of which I ask and pray that your Excellency * * * be pleased to declare said valley to be the legitimate pasture grounds and pastures of the *pueblos*." And the words of the grant state expressly that it is made for that specific purpose.

These *pueblos* were then living upon and cultivating each a grant of land of four leagues, respectively, which had been granted to them nearly a hundred years before and upon which they are still living.

Is, then, this grant anything more than a royal concession of the right of pasturage upon the crown lands, and in common with a like right reserved by and for the government itself?

Looking to the language employed in the grant documents, the entire transaction, and the subsequent conduct of the government respecting the same land, the character of the grant as a mere pasture right seems evident. In 2 White, page 287, the law of Spain, relating to grants of privileges of pasturage, is laid down as follows: "The concession of a great extent of land for the rearing and pasture of cattle constitutes no more than the usufruct of it for the time agreed upon, but the grantee has not nor

never had the remotest right to solicit the proprietorship, for there is no law or regulation upon which to found it; and consequently the land does not go out of the class of public lands, since it is the same as if were held on rent."

The area of land embraced in the boundaries of the grant as claimed amount to something over 276,000 acres, and may therefore be properly termed, in the language above quoted, a "concession of a great extent of land for the rearing and pasture of cattle," and hence the law quoted seems quite applicable thereto.

Additional weight is lent to the view that this is a revocable grant of the pasturage usufruct merely from a consideration of the fact shown by the record that twelve years afterwards, in 1778, the same government, that of Spain, made the San Diego grant, lying wholly or in part within the limits of the grant here claimed, and that afterwards other grants were made of portions of the same grant, notably that of the Espiritu Santo or Holy Ghost valley, to one Baca, which has been confirmed by the congress of the United States, and which grant lies wholly within the boundaries of the grant in question.

It seems quite unreasonable to suppose that if this area in controversy had been granted as an estate in fee to the land the same granting authority would have deliberately granted a portion of the same land to a third party only twelve years after the former grant, repeat a like act in 1815 and afterwards, and that, too, of land situate near the capital, grazed upon by the royal horses of the capital garrison, and the local *alealde* directed in every case to report officially whether the land proposed to be granted was unoccupied or that the grant would be to the injury of third parties.

This grant was prayed solely as a pasturage right; it seems to have been granted for that purpose alone, and it appears that the government afterwards treated it as

such and disposed of the paramount title to a large part of the land upon the same view.

From these facts and considerations the court concludes that this grant was intended and made as a privileged right, license, or royal concession for the use and purpose of pasturage merely, revocable in its nature, and vested no title otherwise in the grantees, and therefore not the subject of confirmation by this court.

One other question only arises requiring determination. What is the term of existence of this license or usufructuary right?

Ordinary grants of privilege or license of user, where no time is expressed limiting the duration unless sooner revoked, as a rule expire with the death of the grantor. In this case the grant, being made by the crown, would not necessarily terminate upon the physical death of the individual-granting sovereign, but when Mexico threw off the Spanish yoke and achieved an independent government the political death of the Spanish sovereignty in this territory must have determined the lifetime of the revocable grant in this case. Even if it could be said, in the language of certain indictments for homicide, that it "lingered, and lingering did live" on, under the Mexican rule most certainly it became extinct at the date of the treaty of Guadalupe Hidalgo.

For these reasons the decree of the court is that the petition of the claimants be dismissed. So ordered.

APPENDIX No. II.

Spanish text of title papers.

TESTIMONIO—CORREGIDO.

Señor Gobernador y Capm. Gral.:

Phe. Tafoya, procurador de esta villa de Santa Fe, paresco ante VS. en toda forma de dro., por y en nombre de Cristobal, Yndio govor del pueblo de Zia y de Tomas, capitán mayor de la grra., de dho. pueblo, qe. esto bienen con comision de su casique y de los demas de su república, y digo, señor, en nombre de los dhos., y de los del comun de los pueblos de Santa Ana y del de los Xemez, qe. estos desde su fundacion han reconocido por sus hejidos en las ynnmediaciones de dhos., sus pueblos, un valle qe. comunite llaman el Ojo del Espíritu Santo, i este en algunos casos urgentes sirve para ejidos de la caballada de este real presidio como es constante y sabedores los dhos. qe. dho. valle á tenido algunos pretendientes vecinos para adquirirlo de merced, lo que sera para los dhos. de grandissimo daño, pues, se hallan con cresidos ganados mayores y menores y caballada para el real servicio, y no tener otro paraje en donde poderlo hacer, yn particular los del pueblo de Zia, pues estos todos lo mas de sus labores son temporales, y parte de ellos en las cañadas de dho. valle ynnmediatas á dho. su pueblo. Por todo lo qual a VS., pido y supeo., en nombre de (S. M., q. D. G.,) sea mui servido de declarar por sus legitimos hejidos y pastos consejables dho. valle mandando se les señalen sus linderos que es por el oriente los dhos. pueblos, y por el poniente la ceja del río Puerco, y por el norte un paraje

que llaman la Bentana, qe. es donde viven unos Apaches Navajoses, i por el sur con las tierras de los vecinos pobladores de dho, río Puerco, que en mandar hacer VS, como yebo pedido recibiran los dhos, mis partes mereed con justicia que pido y juro en nombre de los dhos, no ser de malicia este, este será.

PHE. TAFOYA.

DECRETO.

Villa de Sta. Fee, diez y seis de Junio de mil setecientos sesenta y seis, visto lo pedido por las republicas de los tres pueblos de Zia, Santa Ana, y Xemez, de la nacion Queres, contiguos unos y otros á la rivera del río de Santa Ana, i para determinar segun justicia doi comision á el alee, mayor de dhos, pueblos Dn. Bartolomé Fernandez, para que reconociendo los linderos qe. expresan del Ojo del Espíritu Santo en donde refieren mantener sus ganados y caballadas, me informe las leguas que contendran de norte á sur, y de oriente á poniente, y si los dhos, tres pueblos tendran ganados mayores y menores y caballadas que equivalgan á los linderos que piden para sus pastos, como asi mismo si es ó no perjudicado algun vecino ó vecinos con dhos, linderos por antecedente mereed y posesion legitima, qe. tengan, lo que excentara dho, alee, mayor con la verdad posible, y por este asi lo probei, mande y firme. Yo Dn. Thomas Velez Cachupin, govor, general de este reyno, con dos testigos de mi asa, a falta de escribanos que no los hai en esta gobernacion,

VELEZ CACHUPIN.

Testigo: CARLOS FERNANDEZ.

Testigo: JOSEPH MALDONADO.

YNSFORME.

En cumplimiento de lo mandado por el Señor Dn. Thomas Velez Cachupin, govor, y capm. grad. de este reyno, por

su decreto de diez y seis del corriente Junio, que antecede, yo, Dn. Bartolome Fernandez, alee. mayor y cañ. á grr. de los pueblos de la nacion Queres, pase á reconocer las tierras pedidas por los tres pueblos de Xemez, Zia y Sta. Ana, y los linderos que en su pedimento, expresan, y hallo que comprenden de norte á sur, esto es, de bado de piedra, que es el lindero de los vecinos del río Puerco, hasta la Bentana, como ocho leguas poco mas ó menos, y de oriente á poniente, esto es, desde el pueblo de Zia, que es el mas ynnmediato á las tierras pedidas hasta el río Puerco, como seis leguas poco mas ó menos, en cuia distancia no se que entran tierras utiles para sembrar por ser los agujes cortos y pocos, y solo son utiles para passar ganados mayores y menores de los que abundan dhos. pueblos, sin que tengan las dhas. tres republicas otras tierras en que poder mantener sus ganados, y siendo siento como lo es que ninguno de los sitados, linderos perjudican a vecino alguno aposecionando, ni por aposecionar en tierras comprendidas en ellos, lo que hasiente por diligencia, qe. firme con dos testigos de assa, a falta de escribibanos, que no los hai en este reyno, de ninguna clase, villa de Santa Fee y Junio de mil setecientos sesenta y seis.

BARTOLMÉ FERNANDEZ.

Tt: JUAN MARIA ANTONIO RIVERA.

Testigo: PEDRO PADILLA.

AUTO DE MERCED.

En la villa de Santa Fee, en seis dias del mes de Agosto, de mil setecientos sesenta y seis, yo, Dn. Thomas Velez Cachupin, govor. gral de este reyno del Nuevo Mexico, en atencion a lo pedido por los tres pueblos de Sta. Anna, Zia y Xemez, de la nacion Queres, y al el informe que haee su alee. mayor Dn. Bartolome Fernandez, como de ser terrenos que con sus ganados mayores y menores y caballadas han poseido, y en lo actual abundan, sin tener otros

parajes a donde pastear, lo que los contenidos en su petición, con los cortos agujes que se refieren en dho. ynfomre dije que les concedia y concedí en nombre de S. M. (q. D. G.), los referidos terrenos para el pasto de los ganados y caballadas de los otros tres pueblos, Santa Anna, Zia y Xemez, con los linderos de norte a sur, desde el paraje de la Bentana, hasta el lado de piedra del río Puereo, lindero si mismo de los vecinos del lugar de Sn. Ferndo, y Nra. Sra de la luz, y de oriente a poniente desde el pueblo de Zia, hasta el mismo río de Puereo, orilla de la parte del oriente, quedando todo el valle del Ojo del Espíritu Santo comprendido en el centro y linderos de esta merced, con la calidad y condicion, de que en este dho. valle se pueda y deba poner en caso necesario la cavallada del real presidio de Santa Fee por ser paraje en que a solido pastiarse, do modo que por los mendionados tres pueblos, no se ha de poner embaraso ni reclamar agravio, y para q. considerandose en lo subsiguiente los supra dhos. linderos por de los tres pueblos, lo posean con dro. lexítimo mediante esta real merced, sin q. por ningun vecino o vecinos españoles les sean perjudicados, yntroduciendo sus ganados suponiendo ser comunes los pastos, y mande a el alee mayor Dn. Bartolome Fernandez, pase y de posesion real a dhos. tres pueblos de esta merced y linderos contenidos, llevando consigo a las justicias y mayores de cada uno de ellos, asiendo constar la diligencia a continuacion de este mi auto de merced, q. me debolvera para dar a cada pueblo el testimonio correspondiente de todo, y poner el original en el archivo de este gobierno a donde debe constar y hasi lo provei, concedi, mande y firme autuando con dos testigos de asa, a falta de esribanos que de ninguna clase los hai en esta gobernacion.

THOMAS VELEZ CACHUPIN.

Testigo: CARLOS FERNANDEZ.

Testigo: DOMINGO LABADIA.

POSESION.

En complimto. de lo mandado por el Sor. Dn. Thomas Velez Cachupin, govor. y capn. gral. de este reyno del Nuevo Mexico., yo, Dn. Bartolome Fernandez, alce. mayor y capn. a grra., de los pueblos de la nacion Queres, pase a dhos. pueblos y en compania de los gobernadorellos, casiques y demas justicias de los pueblos de Sta. Anna, Zia, y Xemez pase a las tierras pedidas por los naturales de dhas. tres republicas y mencionados por dho. señor govor. en nombre de S. M., como consta por la antecedente merced, y citando a los conlindantes qe. son los vecinos del puesto de Sn. Fernando del rio Puerco y presente el Thnte. Juan Baptista Montaño, Agustin Gálligo y Tomas Gurule, les tome d ela mano a dhos. gobernadorellos que lo son Cristoval Naspona y Cristoval Chiquiqui, Pedro Chite, casique, Sebastian Lazaro, Juan Antonio, capitanes de la guerra, Agustin, Tomas, Juan Domingo, y demas justicias y los pasie por dhos. tierras, dieron voces, viva, (el rey mro. señors q. D. G.,) tiraron piedras y arrancaron sacate en señal de posesion, la que les di y aprendieron quieta y pacificamente, sin contradiccion alguna, bajo las condiciones expresados en la referida merced, y de los linderos en ellos señalados, que son de norte a sur, de la ventana, el vado de piedra y de oriente, a poniente desde el pueblo de Zia, a orillas del rio Puerco, a la parte del oriente. Y para que asi consta lo firme yo, dho. alce. mayor, con dos testigos de asa, auñuando como juez receptor, a falta de iscribano, que no los hai en esta gobernacion, en este paraje del Ojo del Espiritu Santo, en veinte y ocho de Septiembre, de mil setecientos sesenta y seis años. Doy fe.

BARTOLOME FERNANDEZ.

Testigo: MIGL. TENORIO DE ALBA.

Testigo: PEDRO GARCIA.

Concuerda con su original que quede en el archivo de este gobno, donde, yo, Dn. Thomas Velez Cachupin, góbor. general de este reyno del Nuevo Mejico, lo mande sacar, va fielmente y correjido, y fueron presentes, los de mi asistencia con quienes artuo a falta de escribano, que no los ay en este gobno. En testimonio de verdad.

THOMAS VELEZ CACHUPIN.

Testigo: CARLOS FERNANDEZ.

Tto.: DOMO. LABADIA.

APPENDIX III.

*Opinion of Court of Private Land Claims, Murray, A. J.,
confirming Felipe Tafoya grant.*

In the Court of Private Land Claims, district of New Mexico.

ROMAN A. BACA, petitioner, } No. 67. Felipe
v. } Tafoya grant.
THE UNITED STATES, defendant. }

Mr. Justice MURRAY delivered the opinion of the court:

The grant on which this suit is based was made to Felipe Tafoya, Diego Antonio Chaves, and Pedro Chaves, on the 20th day of June, 1767, by Pedro Fermín de Mendinueta, then governor and captain-general of the province of New Mexico. The several papers constituting the *expediente* of title are genuine, and executed by the proper officers. The testimony tends to show occupation of the lands with cattle, sheep, etc. The petitioner shows such an interest in the land granted as entitles him, under the provisions of the act of March 3rd, 1891, to ask this court to confirm the same.

The controversy between the claimant and the United States is as to the character of the grant and the quantity of land granted. It is claimed by the petitioner that the grant is by metes and bounds and a perfect one, vesting in the grantees an absolute and indefeasible title. It is insisted by the government's attorney that the grant

is by quantity and invested in the grantees nothing more than a right to use and occupy the land with their stock during the pleasure of the sovereign. That the legal title vested in the United States at the date of the treaty of Guadalupe Hidalgo, and that the petitioner has no interest in the land which this court can consider. These questions must be determined by the granting documents in evidence and the laws of Spain in force at the time.

Prior to December 3rd, 1766, one Felipe Tafoya, as attorney for Diego Antonio Chaves and Pedro Chaves, applied by petition to the then governor of the province of New Mexico for a grant of the land in controversy for the purpose of pasturing their stock upon it. On the 3rd of December, 1766, governor Cachupin made a grant in accordance with the prayer of the petition. The grant is as follows:

"If these parties have not had any land whereon to pasture their animals, they might have joined in the new settlement of San Miguere de Learedo and San Gabriel de las Nutrias (in which settlements there are the necessary public pasturing grounds) or have in like manner domiciliated themselves at San Fernando del Rio Puerco, where families not possessing the advantages of lands and pasture grounds were sought for settlement of that place. But these parties doubtless experienced fear, as the said places were frontier places and as they lacked the courage for their establishment, and they have registered the tract they mention for the pasture of their stock, because it is in the peaceful region of the Navajo country. They may occupy the same while the natives of the district do not object to their doing so and prevent them the use of their pasture ground, these parties to endeavor not to injure the said Apache Indians with their live stock or in person, but should rather endeavor, with the greatest love and kindness, to win them over and treat them well, so as to keep them in amity with us, and so that in

the course of time, and showing them good examples and Christian conduct, they may be brought to the holy Catholic faith.

"VELEZ CACHUPIN."

It is quite clear from an examination of this grant that the grantees acquired no title to the lands, but a mere right to occupy it with their flocks during the pleasure of the natives of that district. Some time prior to June 15th, 1767, the same Felipe Tafoya, who presented the petition as attorney for Diego Antonio Chaves and Pedro Chaves in 1766, presented another petition to the then governor for the same land. The petition was on his own behalf, as well as for the said Diego Antonio and Pedro Chaves. The petition is as follows:

"His Excellency the governor and captain-general:

"I, Felipe Tafoya, a resident of this village, legitimate son of Antonio Tafoya, formerly ensign of this royal garrison and one of the soldiers who entered the country with Diego de Vargas at the time of its conquest, from which time he served his Majesty until the year one thousand seven hundred and forty-seven, when, being in active service as ensign, a misfortune befell him by which he utterly lost his eyesight, for which reason he left the royal service and entered the service of his Majesty, as soon as I was of sufficient age, at this royal garrison, in which I continued ten years and until, on account of bad health, I retired from it, without my father or I having asked a grant of one span of land; and having a large family, with a small capital in live stock without anywhere to pasture them, and desiring to increase the same for my own and the support of my children, heirs, and successors, I have associated myself with Diego Antonio Chaves and Pedro de Chaves, in whose name, and as attorney at law of this village, I presented myself before his Excellency, Tomas Velez Cachupin, governor and captain-

general of this Province, your Excellency's predecessor, praying a tract of land unappropriated and unsettled, upon which petition his Excellency was pleased to grant that they, the said Chaves, might pasture their stock upon the land prayed for, under the condition that they were not to injure the Navajo Apaches, all of which will appear to your Excellency from the accompanying petition and decree which I annex, and no complaint whatever having been made on the part of the said Apaches, but, on the contrary, two families having voluntarily joined them, and who are supported by kind treatment, and the land so applied for being known to be unfit for cultivation and fit only for pasture land, on which account the said Apaches have not made, nor will make, any complaint whatever, as is shown by the past. In view of all this I ask and pray that your Excellency be pleased to make to us three a grant in the name of his Majesty (God preserve him) to the tract mentioned in the petitions accompanying, assigning to us as boundaries, on the east the base of a *mesa* facing the land of Salvador Jaramillo, on the west some small white *mesas*, on the north two small springs of water at the point of the said *mesa*, and on the south a timbered hill, which boundaries embrace about one league and a half on each course. And that your Excellency may be satisfied that neither the said Apaches nor any other person whatever would be injured by the grant we ask, I request your Excellency, should you deem it proper to do so, to consult with the chief *alealde*, Bartolomé Fernandez, who is sufficiently acquainted with the lands thereaway, from having frequently travelled over and examined them under appointment conferred on him for that purpose. In consideration of all which, I ask and pray that your Excellency be pleased to cause to be done as I have requested: whereby we shall receive favor and justice, &c.

FELIPE TAFOYA."

On the 15th day of June, 1767, governor Mendinueta made the following order, referring the petition to Bartolomé Fernandez, chief *alcalde*:

"SANTA FÉ, June 15, 1767.

"The chief *alcalde*, Bartolomé Fernandez, will report to me, at foot of this decree, whether the grant prayed for by these parties would injure the Apaches of the Navajo country or any other individual of the inhabitants of the province, and whether the boundaries mentioned embrace the distance given; also, whether the land applied for is suitable for cultivation, and whether the Navajo Apaches have planted or now plant upon the same; all of which he will do in conformity with custom and in accordance with his knowledge of the tract.

"MENDINUETA."

On the 16th day of June, 1767, the *alcalde* made to the governor the following report:

"To his Excellency the governor and captain-general:

"In compliance with what your Excellency commanded of me in your foregoing decree I state that the land applied for by the petitioners I have seen and am acquainted with it, and I do not understand that the granting of the same would be prejudicial to the Apaches of the Navajo country, inasmuch as I have never observed that they, the said Apaches, have lived upon the land permanently, and much less would be prejudicial to the people of this province. The boundary proposed on the western side is to be doubtful, as upon that side are numerous 'small white mesas,' on which account I can not decide upon the distance the parties suppose of one league and a half, and although I remember the boundary they propose on the east, and those from south to north, it appears that

there must be somewhat more than the league and a half. And in regard to whether the land is fit for cultivation, I state that by damming the water a little there a small field can be irrigated, and that although it is a valley and planting may be done therein, it is with the risk of having to depend upon rain, owing to there being no other water for irrigation. And in regard to whether the Navajo Apaches have planted or now plant upon the land applied for, I state that I have seen in a branch of the little valleys scattered here and there a few cornstalks, but I have never observed that the Apaches lived near these small patches of corn; but they mostly make their huts, owing to the dread of the Utes, distant and on the highest and roughest parts of the *mesas*. The foregoing is all that I can state to your Excellency, according to the best of my understanding. Your Excellency will, therefore, act in the matter as to you may seem most proper.

"Santa Fé, June 16, one thousand seven hundred and sixty-seven.

"Erased: 'That I have.' Not valid.

"BARTOLOMÉ FERNANDEZ."

On the 20th day of June, 1767, the governor made the grant in controversy.

From an examination of all the documents in the case, we are of the opinion that the grant of June 20th, 1767, to Felipe Tafoya, Diego Antonio Chaves, and Pedro Chaves is a grant of the land, with the conditions prescribed, and not a mere right to the use and occupation of the same for the purpose of pasturing stock. We know of no reason why the Spanish governors of New Mexico should not have made a perfect grant to land which could only be used for pasture. The legal title to *all* the public land was in the crown, with full power of disposition. The governor of the province of New

Mexico at the date of this grant represented the King in the matter of granting land, and possessed full power and authority to vest the petitioners with the legal title, or with the right to use the same for the purpose of pasturing their stock. It is quite clear that the object in presenting the second petition was to secure the land asked for and not a mere right of pasturage. Two of the petitioners were in the actual possession of the land under the grant from governor Cachupin, which grant gave them the right to the use and occupation of it for the purpose of pasturing their stock. It was known to them that the land was not suitable for cultivation; so it is hardly fair to assume that they were asking the governor to grant them a right which they already possessed under the former grant.

Felipe Tafoya in his second petition refers to the fact that Diego Antonio and Pedro Chaves have been granted the right to pasture their stock on the land, and that it is unfit for cultivation and fit only for pasture land. The governor knew that Tafoya was asking for something more than had been granted to Diego Antonio and Pedro Chaves under the former grant. After a careful investigation, and with the petition and report of the *alcalde* before him, he decreed as follows:

"I did, and I do, grant to the three parties mentioned, Felipe Tafoya, Diego Antonio Chaves, and Pedro Chaves, in the name of his Majesty (God preserve him), and at the place they request it, one league by courses, leaving it to their selection the designation of the center point, from which will be measured off 2,500 Castilian *varas* each way, and if the measure can not be made in a square form, and it will be necessary for it to be oblong or triangular, its circumference shall nevertheless be twenty thousand Castilian *varas*; which concession and grant I do make to them, their children and successors, under the conditions that they shall settle the land with their

stock for four years, required by law, to enable them to acquire legal title and dominion, but they shall not thereafter sell the same to any ecclesiastical person or monastery, under penalty of defeasance." * * *

The Spanish words in the granting clause are: "*Para adquirir legítimo derecho de propiedad y señorío.*" "In order to acquire legitimate right of property and dominion." The Spanish words "*propiedad y señorío*" are equivalent to the English words "fee simple." The word "*propiedad*" means the right to the property, in contradistinction to a use or usufruct, exclusive right to a thing, landed estate or property, etc. (See Nueva Diccionario, p. 502, Escreche, vol. 1, p. 642.) The word "*señorío*" means "dominion," right and power to dispose of a thing. "The territory belonging to the Lord, of which territory he is the owner." (See Escreche, vol. 2, p. 839.)

The governor in the granting decree construed the law of Spain in relation to four years' occupation of land by a grantee in order to perfect title to the land granted. It appearing to him that the land he was granting was unfit for cultivation and fit only for pasturage, he directed that the grantees should settle the land with *their stock* for four years prescribed by law, to enable them to acquire the right of property and dominion. Settling the land with their stock, being the only occupation its character and location would admit of, was deemed a compliance with the law requiring actual occupation by a grantee for four years in order to vest him with a complete title. This holding of governor Mendieta is certainly a common-sense view of the law on that subject, and we think it sound.

It is, however, insisted by the United States attorney that the grant in this case is exactly like the one made to the Indian *pueblos* of Zia, Santa Ana, and Jemez, and that this court at a former term decided that the grant only vested in the grantees an usufructuary right, and that

the *jus desponendi* remained in the sovereign. This point having been pressed by the government's attorney, we have deemed it our duty to reexamine the grant in the case referred to, as well as all the facts, and we are still of the opinion that the decision of the court in that case is correct. Any mistake or uncertainty as to the intention of the granting officer in either case can only arise out of a want of a proper understanding of the meaning of the Spanish words used. The grant to the Indian *pueblos* was based on a petition and report of an *oficio* to the effect that said Indians had held the land for their live stock, without having any other place in which to pasture them, together with the watering places mentioned in said report. The governor grants the "aforesaid land for pasturing the stock and horses of the aforesaid *pueblos*," etc., etc., with the condition and stipulation that in case of necessity the horses of the royal garrison of Santa Fé may and shall be kept in said valley, the same being a place where they have been accustomed to graze; wherefore the aforementioned three *pueblos* are to place no obstruction in the way, nor claims for damages therefor."

The granting clause of the decree is as follows: "They will hold the same with legitimate right of possession under this royal grant, so they be not molested by any Spanish citizen taking their stock thereupon, deeming the pasturage to be common." The Spanish words in the decree of the governor which conferred the right to legitimate possession are: "*Para que lo posean con derecho legítimo.*" The proper rendering of these words into English leaves no doubt as to what rights were intended to be conferred upon the grantees, and they were nothing more than the "right to hold the same, with legitimate right of possession." "*Posean con derecho legítimo*" means "possession with right legitimate." Governor Cachupin, who made this grant, was evidently a man of ability as well as of affairs, and understood the meaning of words used by him in making this grant.

If it had been his intention to have conferred on the Indian *pueblos* anything more than a usufructuary right he would have used the proper words to have conveyed such rights. If he had intended to convey the fee in the land, as was done in the grant to Felipe Tafoya, Diego Antonio Chaves, and Pedro Chaves, he would have used the words "*propiedad y señorío*," as was done by his successor, Mendimeta, or some other words clearly manifesting his intention to pass the legal title.

We have shown the words "*propiedad y señorío*" were intended to and did vest in the grantee the absolute right and title to the land, subject to the conditions prescribed. One may have a legitimate right to possession of land without title, or a valid legal title without possession. (Escreche, vol. 1, p. 642.)

It is quite clear that the *pueblos* under their grant took nothing more than the right to use and occupy the land, the *jus desponendi* remaining in the sovereign. The decree recognizes the fact that all Spanish citizens had a right to pasture their stock on the public lands, and the effect of the grant to the *pueblos* was to prevent Spanish citizens from taking their stock upon the land, "deeming the pasturage to be common." In other words, the grant gave the three *pueblos* the exclusive right to pasture their stock on the land granted, with the exception mentioned. It is evident that this construction was put upon the grant by the officers of the Spanish government, as it appeared in that case that subsequent to the grant to the *pueblos* a large portion of the land had been granted by the proper officers to other parties.

Whilst we are satisfied that the grant to Felipe Tafoya, Diego Antonio and Pedro Chaves vested in them the legal title to the land subject to the conditions prescribed, we are also of the opinion that it is a grant by quantity and not by metes and bounds. The petition set out the boundaries and prayed for a grant of one and a half leagues. The *alcalde*, in his report to the governor,

gives it as his opinion that there are within the boundaries called for in the petition something more than a league and a half. With the petition and the report of the *alcalde* before him, the governor granted only one league by courses, leaving the petitioners to select within the boundaries set out by them the league so granted. There is no ambiguity in the grant. The intention of the governor is clear and explicit. He granted 20,000 Castilian *varas*. If it could not be measured in a square form, and it was necessary to be oblong or triangular, it was nevertheless to be 20,000 *varas*. It is true that if not in a square form its circumference was to be 20,000 *varas*, which would contain an area of something less than one league if measured either oblong or triangular in form. But the grant was for "one league by courses, or 2,500 *varas* each way from a center point, to be selected by the grantees." The *alcalde* measured from north to south 13,700 *varas*, and from east to west 6,300 *varas*, which he says "made the 20,000 *varas* granted to the parties." It is true that 13,700 *varas* and 6,300 *varas* added together make 20,000 *varas*, but as there are but two lines measured it amounted to nothing. But if he meant to say that the two north and south lines were 13,700 *varas* each and the two east and west lines were 6,300 *varas* each, so as to close the lines, the circumference would be forty thousand *varas* and the area three leagues and $\frac{45}{100}$. The area embraced within the natural object set out in the act of possession, according to a survey made by the surveyor general of New Mexico, is something more than five leagues. Whether the calculation and measurement made by the *alcalde* was done by mistake or design it is not necessary for us to determine. The fact remains that only one square league of 20,000 Castilian *varas* was granted. It is insisted by counsel that the action of the *alcalde* is a judicial determination of the quantity, extent, and boundaries of the land granted. And to sustain this contention the court is

referred to the case of *United States v. Pico* (5 Wall., 536), *Van Rossem v. Bolton* (95 U. S., p. 33), and *Graham v. United States* (4 Wall., 259).

In the case of *Graham v. The United States* the grant had been confirmed by the board of commissioners according to the metes and bounds fixed by the *alcalde* in the act of juridical possession. The surveyor-general of California did not follow the measurement contained in the record of juridical possession, which record and map had been adopted by the board of commissioners and referred to in the decree of confirmation for a particular description. The district court set aside and ordered a new survey which should correspond with the measurement. Mr. Justice Field, in delivering the opinion of the court, said: "The record of a proceeding of this nature must necessarily control the action of the officers of the United States in surveying land claimed under *confirmed* Mexican grants." In other words, the court held that the surveyor-general should make his survey in accordance with the boundaries fixed by the decree of confirmation. In the case of *The United States v. Pico*, the rancho of San Margarita and San Onafre were granted in 1841. The grantees were put in possession in 1842. The boundaries were set out in the grant and act of possession. In 1845 the concession was approved by the departmental assembly. The resolution of approval, after designating the tract ceded, adds: "In extent twelve square leagues." These words were supposed to create a limitation upon the quantity granted. Mr. Justice Field said: "It is evident, however, that the words are not used for any such purpose, but merely indicate a conjectural estimate of the quantity. The concession of the governor, with its *specific* description, is referred to in the proceedings of the assembly, and is stated to have been made in conformity with the requirements of law. No objection is suggested to the boundaries given, nor is an intimation made of any intention to exclude from the cession any portion of the

land they embrace or to restrict the concession in any particular." It is further held by the court "that where there is doubt as to the intention of a governor to cede all the land contained within the boundaries designated by him it would be removed by juridical possession delivered to the grantees. This proceeding involved an ascertainment and settlement of the boundaries of the lands granted by the appropriate officers of the government, specially designated for that purpose, and has all the force and efficacy of a judicial determination. It bound the former government, and it is equally binding upon the officers of our government."

The case of *Van Raynegan v. Bottom* was another case where the surveyor-general of California disregarded the decree of confirmation and made the survey according to his own notion as to the quantity of land granted. In speaking of the act of juridical possession Judge Field said: "*Ordinarily* the boundaries thus established would be accepted as conclusive by our government; unless there is something in the *decrees of confirmation otherwise limiting the extent* or the form of the tract, they should control the officers of the United States in making their surveys. It was so held by this court in *Graham v. United States* (4th Wall., 259) and in *Pico v. United States* (5 Id., 536)." It has never been held by the Supreme Court of the United States that an *alcalde* had the power to disregard the express directions of the governor in granting a decree and fix the boundaries and determine the quantity granted to suit his own notion of what ought to have been granted. It was only in cases where there were doubts as to the boundaries or quantity granted, from an examination of the granting documents, that an *alcalde* had the power to determine the quantity or boundaries in the act of juridical possession. It was necessary under the Mexican system that *alcaides* should possess such power. The act of juridical possession was the final act which vested the legal title in the grantee. His acts could not be revised or

changed by any other official. The procedure under the Mexican system necessary to vest a grantee with a perfect title is fully set out in the opinion of the Supreme Court of the United States in the case of *Van Raynegan v. Bolton, supra.*

Alcaldes, under the Spanish law, had nothing whatever to do with the disposition of public lands by virtue of their office. In putting grantees in possession of land they acted as the agent of the governor, and their acts were subject to approval or disapproval by him; as in all other cases of agency, they had only such powers as were conferred upon them by their principal. We do not think the doctrine of prescription has any application to the facts of this case. The grantees could not claim in good faith or by just title more than the league granted. To constitute prescription there must be both good faith and just title. (See 2nd White's Recap., p. 82.)

The grant will be confirmed for one league in the name of the grantees their heirs and assigns. The petitioner will be allowed ninety (90) days to elect where he will have said league located within the boundaries set out in the act of possession, either in a square, oblong, or triangular form; and on failure to so elect, a square league of 20,000 Castilian *varas* will be surveyed for him, beginning at the base of the big *mesa* mentioned in said report of the *alcalde* as the east boundary, and run west 5,000 *varas*; then run from the middle of said line (2,500 *varas* from beginning point) 2,500 *varas* north and south, which will make the 20,000 *varas*. Granted.

The intervening petition of the Atlantic and Pacific Railroad Co. will be dismissed, as it does not appear that it has any interest in the land in controversy.

WILLIAM W. MURRAY,

Associate Justice.

SANTA FÉ, NEW MEXICO,

February 6, 1895.

